

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-1217

B
PPS

To be argued by:

GEORGE SHEINBERG, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA

Appellee

-against-

Docket No. 75-1217

WILLIAM CRUZ

Appellant

-----X

On Appeal from the United States District Court
for the Eastern District of New York

APPELLANT'S APPENDIX

Attorney for Appellant
GEORGE SHEINBERG
ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, N. Y. 11201

ULSTER 2-6262



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RJD:RJD
F# 751, JCI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

WILLIAM CRUZ and
JOHN DOE, also known as "Domingo",

defendants.

S U P E R S E D I N G
I N D I C T M E N T

Cr. No. 75 CR 130
(Title 21, U.S.C., § 841(a)(1)
and Title 18, U.S.C., § 2)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 10th day of February 1974, within the Eastern District of New York, the defendants WILLIAM CRUZ and JOHN DOE, also known as "Domingo", did knowingly and intentionally possess with intent to distribute approximately four (4) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT TWO

On or about the 10th day of February 1974, within the Eastern District of New York, the defendants WILLIAM CRUZ and JOHN DOE, also known as "Domingo", did knowingly and intentionally distribute approximately four (4) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

A TRUE BILL.

FREEMAN.

UNITED STATES ATTORNEY
Eastern District of New York

EASE TAKE NOTICE that the within
e presented for settlement and signa-
to the Clerk of the United States Dis-
Court in his office at the U. S. Court
225 Cadman Plaza East, Brooklyn,
York, on the _____ day of _____
, at 10:30 o'clock in the forenoon.

: Brooklyn, New York, _____, 19_____

United States Attorney,
Attorney for _____

torney for _____

EASE TAKE NOTICE that the within
true copy of _____ duly entered
on the _____ day of _____
, in the office of the Clerk of
U. S. District Court for the Eastern Dis-
of New York,
d: Brooklyn, New York,

, 19_____

(United States Attorney,
(Attorney for _____

torney for _____

CRIMINAL Action No. 15 Cr 130

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

—Against—

WILLIAM CRUZ and
JOHN DOE, a/k/a "Domingo"

Defendants.

S U P E R S E D I N G
I N D I C T M E N T

(T. 21, UEC, §841(a)(1) and
T. 18, USC, §2)

DAVID G. TRAGER
United States Attorney,
Attorney for USA
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
is hereby admitted.

Dated: _____, 19_____

Attorney for _____

R.W. Brewster M-8-73-7355

596-3323

David 12/25/75
at 12/25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

-against-

75 CR 130

WILLIAM CRUZ and DOMINGO QUINONES,

Defendants

- - - - - X

DEFENDANTS' MEMORANDUM OF LAW

PHILIP PELTZ
Attorney for Defendant Quinones
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Brooklyn, New York 11201

GEORGE SHEINBERG
Attorney for Defendant Cruz
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Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

-against-

75 CR 130

WILLIAM CRUZ and DOMINGO QUINONES,

Defendants

- - - - - X

STATEMENT

This memorandum is submitted in support of defendants' objection to the admission of evidence relating to alleged similar crimes of defendant Cruz.

PRIOR SIMILAR ACTS OF
DEFENDANT CRUZ ARE INADMISSIBLE

Evidence of other crimes is admissible if relevant, except when offered solely to prove criminal character. United States v. Papadakis, 510 F. 2d 287, 294 (2 Cir. 1975). Even under the older, limited rule, such evidence was admissible when used to prove intent. The Second Circuit, however, has established parameters into which the use of this evidence must fall in order that the admission not be an abuse of discretion. That the grounds for admission of such evidence have been extended from certain enumerated reasons to "any purpose other than..." does not alter those factors to be taken into consideration when a certain "purpose" is stated.

This case falls squarely within the ambit of United States v. De Cicco, 435 F. 2d 478 (2d Cir. 1970), in which it was held error to admit into evidence the prior acts of misconduct of two of the defendants to show intent.

The government in De Cicco, wherein the charge was that of transportation of stolen goods in interstate commerce, introduced evidence of prior similar acts to prove intent. The Second Circuit found such admission to be an abuse of discretion holding that the Government's case did not raise any substantial issue of intent, nor did the defense attempt to concede the act while disclaiming intent. The chief government witness' testimony,

"if believed, leads ineluctably to the conclusion that the defendants knew what they were doing...Therefore, whatever probative value the prior crimes of (the defendants) added to the prosecution's case on the issue of defendants' intent to commit conspiracy... was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants were a continuing band of art treasure thieves and 'fencers'." United States v. De Cicco, supra at 484.

So, too, in this case, if the testimony of the chief prosecution witness is to be believed, there can be no question as to the intent with which the alleged acts were performed.

The Advisors Notes to the Federal Rules of Evidence express the same view. "The determination must be made whether the danger of undue prejudice outweighs the probative value of

the evidence, in view of the availability of other means of proof ..." (Emphasis supplied) Advisors Notes to Rule 404 (b). If the jury believes Richards, the alleged acts were performed; there can be no question of the defendants' intent. If the jury does not believe Richards, the acts alleged did not occur and intent is irrelevant. The proof of intent through the same means to be used to prove the crime obviates the necessity for this evidence.

The rule that the element of intent must be a substantial issue in the trial to allow proof of prior similar acts to show intent finds strong support in this Circuit. The element of intent must be placed "in issue either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." United States v. Brettholz, 485 F.2d 483 (2 Cir. 1973). A prime consideration is whether there is a real necessity for such evidence created by a sharpening of the issue, either by the prosecution or the defense. United States v. Byrd, 352 F.2d 570, 575 (2 Cir. 1965). Should the defendant, in opening, put intent in issue, such evidence would be admissible on the direct case. United States v. Cohen, 489 F.2d 945 (2d Cir. 1973).

In Brettholz the admissibility of prior similar acts was upheld on the ground that the defendants had themselves placed intent in issue by the very nature of the defense. United States v. Brettholz, supra at 486. But where the defense, as in De Cicco,

speaks to the credibility of the main witness and attempts to shake or discredit his testimony, the issue of intent is not substantial enough to overcome the effect of the prejudice to defendants, and must therefore be excluded from the direct case.

United States v. De Cicco, supra at 483.

CONCLUSION

The proffered evidence of alleged prior similar acts of Defendant Cruz is not admissible in the trial of this action because there does not exist a sufficient question of intent to overcome the prejudice such evidence will create in the minds of the jurors.

Respectfully submitted,

CAROL MELLOR, Of Counsel

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

APR 22 1975

UNITED STATES OF AMERICA
vs.

WILLIAM CRUZ
DOMINGO QUINONES

TIME AM.....
P.M.....

Defendants

75 CR 130

WAIVER OF JURY TRIAL

The defendants, WILLIAM CRUZ and DOMINGO QUINONES, each having been advised as to his constitutional right to trial by Jury, and after consultation with their respective lawyers do hereby knowingly and voluntarily waive the right to trial by Jury pursuant to Rule 23 of the Federal Rules of Criminal Procedure.

Dated; Brooklyn, New York
April 22, 1975

William Cruz
William Cruz- Defendant

George Sheinberg, Esq.
George Sheinberg, Esq. - Attorney

Domingo Quinones
Domingo Quinones- Defendant

Philip Feltz, Esq.
Philip Feltz, Esq. - Attorney

David Trager, U.S. Attorney
By: Ethan Levin-E.S.A.
E.A. Levin- Epstein AUSA.

APPROVED:

John S. Dunn
U.S.D.J.

1 47 MR. PELTZ: Yes, so I'm saying if he drove
2 that frankfurter truck each for two months, that
3 would only take us back to April '74, not back to
4 February.

5 I'll waive any other rebuttal.

6 THE COURT: I want to take ten minutes to
7 review my notes that I have been going through
8 last night and lunch time.

9 MR. LEVIN-EPSTEIN: The Government has the
10 exhibits if you want them.

11 THE COURT: Let me have them. I have them
12 pretty well in mind.

13 MR. LEVIN-EPSTEIN: I'm just collecting them
14 now.

15 (Recess taken.)

16 (After recess.)

17 THE COURT: Generally, I've considered all
18 the argument that I've heard and I've reviewed be-
19 fore now my notes which are generally fairly copious
20 and I think accurate.

21 The case has been vigorously tried and well
22 tried by all counsel. I don't know how they could
23 have done any better.

24 I recognize there are two basic inconsistencies
25 of the Government case. First, with respect to the

1 48 time of the event and secondly with respect to
2 Mr. Richmond's memory and there's one mystery
3 as to whether Mr. Richards or anyone went to 385
4 Palmetto Street between Detective McGroarty's two visits;
5 but there's no evidence that he entered 385 or that
6 there was any cocaine there at the time or that he
7 brought any cocaine out.

8 It's a matter of circumstantial evidence that
9 might support some inferences favorable to defend-
10 ants but I don't think it is conclusive.

11 I'm inclined to take Detective McGroarty's
12 estimates of time as most accurate, but I don't
13 know that I have to decide them precisely.

14 There's no doubt in my mind about certain
15 facts. First, that Detective McGroarty and Officer
16 Poster bought cocaine from Richards on February 19,
17 1974.

18 Second, that Mr. Cruz and Mr. Quinones were in
19 999 Bushwick Avenue at the time in the basement
20 room.

21 Third, that they arrived there after Detective
22 McGroarty and Officer Poster had come in for the
23 second time.

24 Fourth: that Ronald Richards told Detective
25 McGroarty the cocaine had been brought in by the

1 49 people who had arrived just before he went out
2 of the room.

3 I can imagine reasons why Mr. Richards might
4 lie as to the source of his cocaine, but I think it's
5 more likely that he was telling the truth with respect
6 to this particular occasion and that is corroborated,
7 I believe, by the evidence of Mr. Cruz had dealt
8 in cocaine before, not only pursuant to Mr. Richards'
9 testimony but also according to Officer Castro's
10 testimony.

11 That indicates to me that his purpose in
12 coming to 999 Bushwick Avenue was to deliver cocaine.

13 I find beyond a reasonable doubt that
14 Mr. Cruz came to 999 Bushwick Avenue on February 19,
15 1974, to sell cocaine; that he had a quantity
16 in his possession and that he distributed it to
17 Mr. Richards and therefore I find him guilty on both
18 counts, and I deny the motions for acquittal.

19 As to Quinones, I think it is more likely
20 than not he was acting in concert with Mr. Cruz,
21 came there to protect his interest and perhaps those
22 of his in-laws in collecting his share or their
23 share of the proceeds of the cocaine; however, the
24 corroboration of Richards' testimony was less
25 substantial on Cruz -- on Quinones than in the

1 50 case of Cruz.

2 I don't think the business card can be given
3 quite as much weight as Mr. Levin-Epstein wanted to
4 put on it.

5 And assuming that Mr. Quinones lied on the
6 witness stand to protect himself and incidentally
7 to protect Cruz, I don't think that's enough to show
8 that he received the money that Richards said was
9 given to him.

10 Subsequently, I find there is a reasonable
11 doubt of Mr. Quinones's guilt. I find him not guilty
12 on both counts, and I grant the motion for acquittal.

13 I'm uneasy about releasing somebody that's
14 likely to be a drug dealer, but I think that's the
15 consequence of the Government's burden of proof
16 beyond a reasonable doubt, and I hope that
17 Mr. Quinones will learn a lesson from his narrow
18 escape and separate himself entirely from any deal-
19 ings in cocaine or any other illicit drugs.

20 MR. SHEINBERG: Might I take exception to your
21 Honor's ruling in that if your Honor finds one of
22 the defendants, pursuant to the indictment as was
23 submitted, guilty beyond an reasonable doubt and
24 the other defendant not guilty in the credible testi-
25 mony or the testimony, your Honor must find, as a

1 51 matter of, I think, of law, if your Honor believed
2 Quinones' testimony or believed that Quinones was
3 there and what he testified to, your Honor must
4 find the co-defendant not guilty by the matter of
5 the testimony of Mr. Quinones --

6 THE COURT: Nobody took exception to my
7 charge at the first trial. The Jury could find both
8 guilty, both not guilty or one guilty and one
9 not guilty.

10 I think the fact that I received evidence
11 with respect to Mr. Cruz which was not admissible
12 with respect to Mr. Quinones is a factor.

13 I deny your motion.

14 MR. SHEINBERG: Of course, my exception was taken
15 at the time this morning -- when we started this case
16 as to the prior acts, but if your Honor found as a mat-
17 ter of fact that both defendants were there at the
18 same time and if your Honor found as a matter of fact
19 that Quinones who testified that he was there to buy
20 marijuana, if your Honor found as a matter of ffact
21 they were in each other's company, accompanying each
22 other the entire time, your Honor must find as a
23 matter of fact that the testimony of Mr. Richards
24 that Mr. Cruz turned over a certain packet of
25 cocaine from him and received money in return was

1 52 untrue and, your Honor, therefore reasonably and
2 logically must find that Cruz was not guilty, for
3 another reason.

4 MR. LEVIN-EPSTEIN: Of course the converse
5 to that argument, your Honor, if you find Richards
6 believable as to the portion you found him believable,
7 you must find him believable to the portion expect-
8 ing Mr. Quinones.

9 MR. SHEINBERG: The inference should be if
10 your Honor has found one defendant not guilty be-
11 cause of what he states to be the facts, then your
12 Honor must find the other defendant not guilty also.

13 This is not a Jury where they can speculate.
14 It was testimony given as to what occurred at a
15 specific time in a specific place.

16 THE COURT: I've announced my decision and
17 it stands.

18 MR. SHEINBERG: My exception, of course.

19 THE COURT: What's the bail status on Mr. Cruz?

20 MR. LEVIN-EPSTEIN: Your Honor, according to
21 the file I have, Mr. Cruz is held on \$25,000 surety
22 bond which has been posted by virtue of I believe
23 a brick bond, meaning I think some property was put
24 up.

25 I'll check it now.